TESTIMONY OF DAVID J. STERN
COMMISSIONER, NATIONAL BASKETBALL ASSOCIATION

BEFORE THE SUBCOMMITTEE ON COMMERCE,
TRADE, AND CONSUMER PROTECTION
U.S. HOUSE OF REPRESENTATIVES

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Chairman Stearns and Members of the Subcommittee:

On behalf of the National Basketball Association ("NBA"), I appreciate the opportunity to testify before the Committee regarding H.R. 1862, the "Drug Free Sports Act."

The NBA supports the efforts of this Subcommittee and the Congress to confront and address the issue of steroids and performance-enhancing substances in professional sports. These drugs undermine the fundamental integrity of all athletic competition; they pose serious health risks to the players involved; and their use in major league sports sends a harmful and potentially destructive message to countless young fans who emulate professional athletes. Steroids and performance-enhancing drugs have no place in the NBA.

In 1999, the NBA and the National Basketball Players Association ("Players Association") agreed through collective bargaining to include steroids and performance-enhancing substances in our pre-existing drug testing program.

Since that time – again, through agreement with the Players Association -- we have made improvements to the program by adding new performance-enhancing substances to our list of banned drugs, and by implementing and expanding an ongoing program to educate players about the dangers of these substances.

I should point out that the NBA, in 1999, had no evidence of even minimal use of steroids or performance-enhancing drugs by NBA players. Nor are we aware of any such evidence today. But we believed then – and still believe today – that a strong and effective testing policy is the best way to ensure that these substances never enter the culture of the NBA, and to demonstrate to our fans the collective commitment of NBA teams and players to fair and legitimate competition.

Currently, the NBA and the Players Association are engaged in active negotiations for a new labor contract, to succeed the one that is scheduled to expire on June 30th of this year. In those negotiations, the NBA has already made proposals to the Players Association that would significantly strengthen our steroids and performance-enhancing drug program, and the NBA is committed to obtaining those improvements as part of the new agreement. These proposals include increasing the number of random tests for all players to 4 times per season, adding 1 random test for players during the off-season, broadening our already-substantial list of banned steroids and performance-enhancers to include all those declared illegal by Congress and many that are prohibited by WADA, and toughening the penalties for violators.

It is my belief that the NBA can maintain a sound drug testing policy for steroids and performance-enhancing substances through collective bargaining with the Players Association. Indeed, a policy that is the product of agreement between management and labor will always be superior to one that is imposed from the outside, as the parties to the agreement will be invested in its success. Nevertheless, if this Subcommittee and the Congress feels that legislation must be enacted in this area, we offer the following observations on the specific proposal contained in the Drug Free Sports Act.

First, while the provisions of the bill set forth certain baseline standards regarding testing, substances, and penalties, the particulars of those standards are left up to the Secretary of Commerce, to be issued 9 months after the bill becomes law. Without knowing the specifics of the regulations, of course, it is not possible for us to react fully to the proposal, or to anticipate its effect on the NBA.

Second, as noted above, the NBA would prefer to manage our own drug testing program, rather than having this task performed by some "third party." The NBA has been testing its players for drugs since 1983. We have substantial experience in this area, are highly knowledgeable about the schedules and habits of our players, and are confident in the integrity of our processes and methods. Moreover, because the Players Association, along with the NBA, jointly created our anti-drug program, NBA players have confidence in its legitimacy and impartiality, and that trust is critical to making the program run smoothly. We assume, under these circumstances, that the NBA would obtain –

under Section 4 of the Act -- an exemption from the requirement that our testing be administered by an outside party.

If Congress did require that a third party administer the NBA's drug testing program, we would want the ability to monitor the testing and have input into the testing protocols in order to ensure that these processes were being conducted in accordance with the highest standards of integrity and fairness to NBA players. It appears that some consideration has been given to this idea in Section 3(5), which provides that the professional sports association – and not the third party administrator -- would hear and decide any appeal filed by a player to an adverse testing determination. This is a step in the right direction, but more would be needed to satisfy the NBA and its players that a third-party drug testing program is being administered properly and fairly.

Third, while we believe it is important to prohibit a broad list of steroids and performance-enhancing substances, we do not believe that the WADA list of banned substances is appropriate for the NBA. The sport of basketball emphasizes a specialized set of physical abilities – particularly quickness, agility, and basketball skill – that are distinct from those required in a number of other sports. Accordingly, illicit substances that could assist athletes in strength sports (such as weightlifting or football), power sports (such as baseball), or endurance sports (such as cycling or marathon running) are not likely to be of benefit to NBA players. The Subcommittee might want to reconsider whether it is sensible to test NBA players for these substances, or for the NBA to be required to incur the cost of such unnecessary testing.

Fourth, while stiff penalties are necessary for the legitimacy of any anti-drug program, we believe the Subcommittee should consider tempering the penalties mandated by the Drug Free Sports Act. Under the usual "strict liability" standard that is applicable to drug testing policies (including the NBA's current policy), a player can commit a violation unknowingly by, for example, ingesting a tainted nutritional supplement that is legally sold over the counter. Under those circumstances, a two-year ban (if the violation was the player's first) or a lifetime ban (if the violation was the player's second) would appear to be too harsh. Indeed, even the WADA Code does not provide for strict adherence to the penalties proposed in the bill, and instead makes clear (in Section 10.5 of the Code) that special circumstances – such as a contaminated supplement – should be taken into account and could result in a reduced (or even no) penalty. Fundamental fairness to athletes whose livelihoods are at stake should require no less.

The NBA believes that the penalties we have proposed to the Players Association in our current round of collective bargaining are fair and appropriate for our sport. Under that proposal, a first-time offender of the steroids and performance-enhancing drugs policy would be suspended from his team for 10 games. In the NBA, where the average player now earns approximately $4.5 million per season, a ten-game suspension would result, on average, in a financial penalty to the player of $500,000. The player's suspension would also be publicly announced, which would do significant damage to the player's reputation and off-the-court financial prospects.

The NBA's proposed penalty for a second offense – a suspension of 25 games – would result in an average financial penalty of $1.25 million, and could significantly affect a player's ability to obtain any performance-based bonuses in his contract or prove his value for purposes of obtaining a subsequent contract. If a player were to receive a third "strike," he would be dismissed and disqualified from the NBA. In this instance, as we have done in other areas of our drug program, we would allow for the possibility of reinstatement after two years in exceptional circumstances – but only if the player could satisfy the NBA and the Players Association that reinstatement is warranted. In practical effect, as has been the case with other NBA players who have been dismissed and disqualified from the NBA under our drugs of abuse program, this punishment would often result in the player never again being employed in the NBA.

The foregoing penalties, we submit, are strict enough to punish violators appropriately, deter the use of steroids and performance-enhancing drugs in the NBA, and provide fair opportunities for players to conform their conduct appropriately. Moreover, these are penalties that the NBA believes it can agree upon with the Players Association at the bargaining table. If Congress requires penalties that are stiffer than these, it could well result in greater opposition from the Players Association in other areas of the program, such as the number of times each season that a player will be required to submit to a test.

Finally, Section 5 of the Act sets forth penalties that would apply only to professional sports leagues if they fail to implement drug testing programs that meet or exceed the applicable minimum standards. We assume, therefore, that

the bill would allow a sports league simply to impose such a program without bargaining its provisions with the players' union or otherwise complying with the federal labor laws. If that is not the case (and it would be helpful if the Act were made clear on this point), we would suggest that the penalties be made applicable to both management and labor, thereby providing incentives for both parties to reach an agreement in collective bargaining that meets the proposed federal standard.

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In summary, the NBA believes it can maintain a strong and effective drug testing policy for steroids and performance-enhancing substances, and we expect to have just such a program in place when we conclude our new collective bargaining agreement. If Congress nonetheless sees fit to establish minimum standards for such a program, we suggest that they be flexible enough to account for characteristics that distinguish one professional sport from another, and reasonable with respect to penalties. In all events, we appreciate the Subcommittee's effort and attention to this important matter, and look forward to providing any additional information or assistance as necessary.

I thank the Subcommittee for considering the views of the NBA on this significant piece of legislation.